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No. 290

In the Supreme Court of the United States

OCTOBER TERM, 1968

CROWN COAT FRONT CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
EDWIN L. WEISL, JR.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
PATRICIA M. BAPTISTE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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On May 14, 1956, petitioner entered into a contract with the Department of the Army to manufacture and deliver 89,786 canteen covers of mildew-resistent felt, at a total price of $60,091.76. Pursuant to the terms of the contract, petitioner submitted sample canteen covers for inspection and testing. The samples were rejected on the ground that they were not sufficiently mildew resistent. At petitioner's request, the contract was modified to permit it to supply the non-conforming covers at a total price reduction of $270.01, and the covers were delivered on December 14, 1956.

On October 4, 1961, petitioner filed a claim with the contracting officer, contending that the government had used an improper method in testing the samples, and demanding a refund of the $270.01 price adjust-

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ment plus an equitable adjustment for increased costs occasioned by delay resulting from the rejection of the samples.[1] On February 21, 1962, the contracting officer found that the method of testing was proper and denied petitioner's claim. The Armed Services Board of Contract Appeals affirmed the contracting officer's decision on February 28, 1963. On December 12, 1962, two months before the Board rendered its decision and two days before the statute of limitations would have run, petitioner filed a complaint in the Court of Claims under 28 U.S.C. 1491, seeking damages of $25,270.01 for breach of the contract.

On July 31, 1963—five months after the Board's decision, but six years and seven months after petitioner had completed performance—petitioner commenced the present action in the district court under the Tucker Act (28 U.S.C. 1346(a)(2)) to review the Board's decision; petitioner sought a refund of the $270.01 price adjustment and a sum "not exceeding $10,000" as compensation for extra production costs. Because of the pendency of two suits arising out of the same transaction, the Court of Claims dismissed the suit before it without prejudice. See 28 U.S.C. 1500. The district court thereafter granted the government's motion for summary judgment on the ground that the complaint was barred by the six-year statute of limitations (28 U.S.C. 2401(a)). The court of ap-

[1] This demand was made under the standard "disputes clause" in the contract, which provided that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer" and that an appeal from his decision could be taken to the Secretary of the Army or his authorized representative.

peals affirmed. 363 F. 2d 407. This Court reversed, holding that if petitioner's claim arose under the disputes clause of the contract, the cause of action did not accrue until the final decision of the Armed Services Board of Contract Appeals was rendered. 386 U.S. 503. The Court specifically stated that if, however, petitioner's claim was not within the disputes clause, and was merely founded on an alleged breach of contract, it was for the district court to determine whether that claim was time barred. 386 U.S. at 522.

On remand in the district court, petitioner abandoned its claim under the disputes clause and sought to amend its complaint to assert a claim for simple breach of contract and to increase the damages sought to $19,556.03. The district court held that it would not be in the interest of justice to allow the amendment to the damages, on the ground that, since there was no showing that the amount of damages was unknown in 1963, the amendment was an attempt to oust the district court of jurisdiction and transfer the cause to the Court of Claims for a procedural advantage (Pet. App. 31; see Rule 15(a), F. R. Civ. P.; 28 U.S.C. 1406(c)).

The court then granted the government's motion to dismiss the complaint because the action for breach of contract was barred by the six-year statute of limitations. Both parties agreed that the cause accrued on December 14, 1956, but petitioner argued that the statute of limitations was tolled on December 12, 1962, when it filed a timely suit in the Court of Claims. The court rejected that argument, holding that the statute of limitations is jurisdictional and is

not tolled by the commencement of an action against the government which is later dismissed (Pet. App. 33–34). The court also rejected petitioner's additional contention that the statute was tolled because the nature of the test had been concealed by the government. The court found that there was no allegation of any wrongful withholding of that information, and that petitioner merely failed to ascertain the existence of its alleged cause of action, which did not affect the running of the statute of limitations (Pet. App. 35–36). The court of appeals affirmed (Pet. App. 11–22).

1. The decisions of both courts below are correct. Petitioner's amended cause of action for simple breach of contract concededly accrued on December 14, 1956, the date of final delivery under the contract. Petitioner's complaint for breach of that contract (as amended) was not filed until July 31, 1963—~~six~~ seven and one half months after the statute of limitations had run (28 U.S.C. 2401).

This Court has consistently held that limitations on the United States' consent to be sued are to be strictly construed. *E.g., United States* v. *Sherwood,* 312 U.S. 584. This is particularly true with regard to time limitations, for otherwise the result would be to "impose the tolling of the statute in every time-limit-consent Act passed by the Congress. * * * Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano* v. *United States,* 352 U.S. 270, 275–276.

In enacting 28 U.S.C. 1406 and 1506, to provide that suits brought in the wrong forum might be transferred

rather than dismissed, Congress apparently recognized that a complaint might be timely, but improperly, filed in the Court of Claims and yet not toll the running of the statute of limitations, with the result that a later attempt to file the same claim in a district court might be barred. The transfer provisions were designed to save the cause of action from the statutory bar where a timely complaint is filed in an incorrect forum and subsequently transferred, after the statute has run, to the correct forum. Nothing in those provisions, however, acts to save the cause of action if the complaint is dismissed rather than transferred. As the Senate Report stated, "filing suit in the wrong court cannot operate either to shorten or enlarge the applicable statute of limitations." S. Rep. No. 1894, 86th Cong., 2d Sess., p. 2.

Unlike *Nager Electric Co.* v. *United States*, 368 F. 2d 847 (Ct. Cl.), on which petitioner relies, petitioner has not attempted to join alternative claims based on the disputes clause and on breach of contract. The sole claim is for breach of contract, and petitioner's only ground for avoiding the statutory bar is that the statute was tolled by the filing of the suit in the Court of Claims. Petitioner's maneuverings in this case, however, demonstrate the flaw in the rule for which it argues. At the time petitioner filed its complaint in the district court, all administrative proceedings had been completed, and petitioner could fairly be required to determine whether its claim for relief was within the disputes clause or was founded on breach of contract. Rather than amending its protec-

tive action in the Court of Claims, petitioner elected to file a suit for review of the Board's decision in the district court and abandon its Court of Claims action. Having established its right to maintain that suit, after great expense to the government and the courts, petitioner decided that its claim is not within the disputes clause, calling for review of the Board's decision, but instead is based on a breach of contract which occurred in 1956. And petitioner also sought to increase its claim for damages in order to require that the case be transferred back to the Court of Claims. Having twice elected to forego its breach of contract claim, petitioner should not be permitted to present that claim when and where it chooses solely by reason of its abandoned suit in the Court of Claims.

2. The running of the statute of limitations was not tolled by the government's failure to volunteer information regarding the type of test performed on the felt canteen covers. As noted by the district court, petitioner failed to allege any intentional concealment regarding these tests.[4] Petitioner's delayed knowledge apparently resulted from its failure to exercise due diligence in inquiring into the type of test used. That is not sufficient to prevent the running of the statute of limitations. See, *e.g.*, *Spevack* v. *United States*, 390 F. 2d 977 (Ct. Cl.); *Japanese War Notes Claimants Ass'n.* v. *United States*, 373 F. 2d 356 (Ct. Cl.), certiorari denied, 389 U.S. 971.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
PATRICIA S. BAPTISTE,
Attorneys.

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